ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Application of SBC Communications, Inc. and Ameritech Corporation for Consent to Transfer of Control	)	CC Docket No. 98-141

Opposition of

E.SPIRE COMMUNICATIONS, INC.

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SUMMARY

e.spire believes that the proposed merger will seriously hinder competition in the 13 states where SBC and Ameritech operate. In e.spire's experience, both SBC and Ameritech have consistently engaged in anticompetitive conduct, have consistently failed to demonstrate a willingness to facilitate competition in the manner contemplated by Congress, and have, at every turn, hindered efforts by competitors to establish a foothold in their territories. Such conduct has the sole purpose of thwarting the legitimate efforts of competitive carriers such as e.spire to take advantage of opportunities created by Congress in the 1996 Act.

As discussed below, SBC and Ameritech have not met the "heavy burden" of showing that this merger is in the public interest. The articulated rationale for this merger is that it will enable the combined company to roll out its "National/Local Strategy" which consists of the facilities-based entry of SBC into the 30 top markets outside the SBC/Ameritech region. What SBC and Ameritech fail to note, however, is that CLECs already have accomplished what SBC and Ameritech propose -- without the RBOCs' ready access to cheap capital, without a monopoly stream of revenues, and without the access to technical resources available to RBOCs. Thus, it is simply implausible that neither SBC nor Ameritech could complete this roll out on their own. If small start-up companies such as e.spire can find the resources to build networks and compete, then so too can SBC and Ameritech. And they can easily do it as stand-alone companies.

e.spire respectfully submits that the FCC must distinguish between this merger and the Bell Atlantic/NYNEX merger approved last year. Indeed, several significant factors dictate that a different conclusion be reached. First, the SBC/Ameritech merger (estimated value \$62 billion) is more than twice the size of the Bell Atlantic/NYNEX merger (estimated value \$25

billion). Second, SBC already has acquired two other ILECs – PacTel and SNET. Third, both SBC and Ameritech have an established record of anticompetitive conduct. Fourth, as a result of this merger, SBC will become the largest local exchange service provider in the country, covering 13 states and approximately *one-third* of the local access lines nationally. Finally, the degree of consolidation that already exists in the industry is very high.

e.spire submits that the alarming trend towards consolidation of monopolists to achieve growth must end. If SBC and Ameritech want to compete, they can roll out new networks, products and services, just like their competitors. Moreover, they can take some risks, make hard decisions and play by the rules established by Congress. e.spire urges the Commission to find that SBC and Ameritech have failed to meet the "heavy burden" they carry in demonstrating that the public interest will be served by this merger, and consequently, to deny SBC's application for approval to acquire Ameritech.

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OPPOSITION OF e.spire COMMUNICATIONS, INC.

e.spire Communications, Inc. ("e.spire"), by its attorneys, hereby submits its opposition to the acquisition of Ameritech Corporation ("Ameritech") by SBC Communications, Inc. ("SBC"). For the reasons set forth below, e.spire respectfully requests that the Commission deny the application of SBC and Ameritech for approval of a transfer of control of Ameritech.

Introduction

e.spire, through its operating subsidiaries, is a facilities based competitive local exchange carrier ("CLEC"). Since its formation in 1993, e.spire has constructed 32 state-of-the-art fiber optic networks in 20 states, over which e.spire provides local exchange and exchange access services to its customers. e.spire also provides resold interexchange services to customers nationwide.

e.spire competes directly today with SBC in five (5) states, namely Texas, Oklahoma, Kansas, Missouri, and Arkansas. e.spire also is in the process of negotiating interconnection agreements with SBC's Pacific Telesis ("PacTel") affiliate in California and Ameritech in

Illinois, with the intention of expanding its operations and network into these states. Thus, e.spire has a direct and immediate interest in the outcome of this proceeding.

e.spire has negotiated interconnection agreements with SBC on behalf of its subsidiaries, and has purchased unbundled network elements ("UNEs") and other services and facilities from SBC. e.spire also is in the process of trying to adopt an agreement pursuant to Section 252(i) which Ameritech had previously executed with another carrier for the state of Illinois. As a result, e.spire has first-hand knowledge of the effort, or lack thereof, that SBC and Ameritech have made to implement the pro-competitive provisions of the Telecommunications Act of 1996 (the "1996 Act") and the Commission's rules related thereto. On the basis of its experiences with both SBC and Ameritech, e.spire believes that the threat of anti-competitive conduct on the part of a combined SBC/Ameritech poses too great a danger to competition to be overcome.

e.spire believes that the proposed merger, which is valued at $62 billion (more than twice the size of the Bell Atlantic/NYNEX merger), will seriously hinder competition in the 13 states where SBC and Ameritech operate. SBC and Ameritech are both incumbent local exchange companies ("ILECs") that, in e.spire's experience, have consistently engaged in anticompetitive conduct, have consistently failed to demonstrate a willingness to facilitate competition in the manner contemplated by Congress, and have, at every turn, hindered efforts by competitors to establish a foothold in their territories. Such conduct has the sole purpose of thwarting the legitimate efforts of CLECs such as e.spire to take advantage of opportunities created by Congress in the 1996 Act.

Local competition has not taken root sufficiently, and CLECs do not have an adequate market presence, to offset the potentially devastating impact of this consolidation. Indeed, just a little more than one year ago, the Commission recognized that "[c]ompetition in the local exchange and exchange access marketplace is still in the earliest stages."[1] Unfortunately, despite what the ILECs would have everyone believe, not much has changed since then.[2]

As recently as September 16, 1998, Senators on the Senate Judiciary Committee's antitrust subcommittee wrote to both DOJ and the FCC to express their concern that "the pace of consolidation in the industry has reached a point where it is a matter of serious public concern."[3] Subcommittee Chairman Mike DeWine has stated publicly that "[w]e've heard too many unkept promises of market entry and seen too many failed plans for local competition," said Subcommittee Chairman Mike DeWine (R-Ohio).[4] Moreover, Senators DeWine and Kohl have observed that "[n]early three years after passage of the 1996 Telecommunications Act, local competition is minimal and the act itself has been bottled up by court challenges."[5] Notably, neither Ameritech nor SBC has taken any steps to enter new markets or to open their markets to competition – other than those that were forced upon them by the courts.

In addition, Chairman Kennard has called the SBC/Ameritech merger a "pretty massive consolidation" stating that "[i]n my view, these two companies have a heavy burden to prove this merger will serve the public interest and the pro-competitive bias of our telecommunications

1 *In the Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX corp. and Its Subsidiaries,* 12 FCC Rcd 19985, Memorandum Opinion and Order, ¶ 4 (1997) (hereinafter "*Bell Atlantic/NYNEX Order*").

2 CLECs have approximately 1.9 million access lines in service, representing approximately two percent (2%) of all local lines. *See* Statement of Commissioner Susan Ness on Mergers and Consolidations in the Telecommunications Industry before the Committee on the Judiciary U.S. House of Representatives, June 24, 1998 (1998 FCC LEXIS 3047)(hereinafter, "*Statement of Commissioner Ness*").

3 Letter to Chairman Kennard from Senators DeWine, Kohl, Thurmond and Leahy, September 16, 1998.

4 Communications Today, September 16, 1998.

5 *Id.*

law."[6] As discussed below, SBC and Ameritech have not met the "heavy burden" of showing that this merger is in the public interest. Indeed, the rationale articulated in support of the merger of these two huge monopolies does not even pass the "straight face" test. Arguing that they could not and would not undertake the implementation of their so-called "National/Local Strategy" which contemplates "the essentially simultaneous, facilities-based entry of the combined company into each of the Top 30 major U.S. markets outside of the area in which it would be the incumbent carriers[,][7]" as stand-alone companies, SBC and Ameritech state that their "strategy recognizes that penetrating out-of-region markets, both nationally and internationally, will be expensive, take time and require substantial experienced managerial resources."[8] Given that the 1996 Act was passed almost three years ago, and it took them this long to figure out that remaining competitive was going to be expensive, time consuming and require experienced management, it appears that the biggest problem faced by SBC and Ameritech is not a lack of "critical mass," as they suggest.[9] In any event, e.spire submits that the "National/Local Strategy" propounded by SBC and Ameritech is no more ambitious that any build-out that has already been undertaken by a number of CLECs, including MFS, TCG, Brooks Fiber, and itself.

CLECs already have accomplished what SBC and Ameritech propose -- without the RBOCs' ready access to cheap capital, without a monopoly stream of revenues, and without the access to technical resources available to RBOCs. While e.spire agrees that penetration into the

6 *Kennard Promises Hard Look at SBC-Ameritech*, Communications Today, July 27, 1998.

7 *Application of SBC Communications, Inc. and Ameritech Corp. for Consent to Transfer of Control*, CC Docket No. 98-141, Application, p. 5 (filed July 24, 1998) (hereinafter "*SBC/Ameritech Application*").

8 *SBC/Ameritech Application* at 13.

9 *See SBC/Ameritech Application* at 19.

residential markets has not been achieved, most of the blame for that resides with the ILECs themselves who have refused to establish truly cost-based rates for unbundled network elements and have resisted cost-efficient physical collocation arrangements. Thus, all of the benefits of this merger articulated by SBC and Ameritech are merely castles in the air. They do not reflect the actual forces at work in the industry, or the ILECs role in subverting them. Nor do they reflect the truth about what SBC and Ameritech are really up to.

e.spire recognizes that the FCC has approved a number of significant mergers recently, and that it will be necessary to distinguish this one. Even so, the SBC/Ameritech deal is in a league by itself – at least for the time being, dwarfing even the largest of the previous mergers. It also follows closely on the heels of SBC's acquisition of two other very large ILECs – PacTel and Southern New England Telephone ("SNET"). e.spire urges the Commission to review this merger closely and to evaluate the claims of SBC and Ameritech carefully. e.spire submits that the Commission must acknowledge that the trend towards consolidation will make it increasingly difficult for smaller carriers to compete – despite the fact that it is the smaller carriers that have driven local competition forward from the start. Thus, e.spire respectfully requests that the Commission deny SBC's request for authority to take control of Ameritech.

I. THE SBC/AMERITECH MERGER DOES NOT SURVIVE SCRUTINY UNDER THE COMMISSION'S COMPETITIVE ANALYSIS

A. The Public Interest Standard Applied to Mergers Encompasses the "Broad Aims of the Communications Act"

Over the last few years, the FCC has developed a thorough and thoughtful process for reviewing proposed mergers. This process considers a variety of factors including "the trends and needs of the industry" as a whole, the factors that "influenced Congress to make specific provision for the particular industry," and the complexity and rapidity of change in the industry."[10] The standard against which these factors are measured is the "public interest" standard, which, as the Commission observed,

> is a broad, flexible standard, encompassing the "broad aims of the Communications Act." These "broad aims" include, among other things, the implementation of Congress' "pro-competitive, de-regulatory national policy framework" for telecommunications, "preserving and advancing" universal service, and "accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services. . . . A merger will be pro-competitive if the harms to competition – *i.e.,* enhancing market power, slowing the decline of market power, or impairing this Commission's ability properly to establish and enforce those rules necessary to establish and maintain the competition that will be a prerequisite to deregulation – are outweighed by benefits that enhance competition. If applicants cannot carry this burden, the applications must be denied.[11]

Noting that "mergers and other consolidations can be used by firms as a tactic for defending against new competition and creating a further concentration of monopoly power[,]" Commissioner Ness described the FCC's job in reviewing mergers as "sort[ing] out those that have beneficial effects from those that do not (or, in the latter case, to explore ways in which detrimental effects can be more than offset by procompetitive conditions)."[12]

Importantly, the burden is on SBC and Ameritech to prove that the benefits of this merger outweigh the harm. As discussed below, SBC and Ameritech have not met this burden.

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10 *Bell Atlantic/NYNEX Order* at ¶ 3.

11 *Bell Atlantic/NYNEX Order* at ¶ 2. The Commission also noted that the applicants "carry the burden of showing that the proposed merger would not eliminate potentially significant sources of the competition that the Communications Act, particularly as amended by the Telecommunications Act of 1996, sought to create." *Id.* at ¶ 3.

12 *Statement of Commissioner Ness*, June 24, 1998.

B. Competition is the Focus of the Competitive Analysis

The Commission has articulated its analysis of mergers that raise horizontal market power concerns as follows:

> [W]e begin by defining the relevant markets, both in terms of the relevant products and geographic scope. Once we have defined the relevant markets, we identify the market participants, especially the most significant market participants. Next, we evaluate the effects of the merger on competition in the relevant market, such as whether the merger is likely to result in either unilateral or coordinated effects that enhance or maintain the market power of the merging parties. In addition, we also consider the effect of the merger on the Commission's ability to constrain market power as competition develops, but before competition is itself sufficient to constrain market power. We also consider whether the proposed transaction will result in merger-specific efficiencies . . . and whether the merger will support the general policies of market-opening and barrier-lowering that underlie the 1996 Act.[13]

1. Relevant Markets

a. Product Markets

The Commission has defined a "product market" as a "service or group of services for which there are no close demand substitutes."[14] In the *Bell Atlantic/NYNEX Order*, the FCC identified three relevant product markets: (1) local exchange and exchange access service; (2) long distance service;[15] and (3) local exchange and exchange access service bundled with long

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13 *See Bell Atlantic/NYNEX Order* ¶ 37.

14 *Bell Atlantic/NYNEX Order* at ¶ 50 (citing Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order, CC Docket No. 96-61, FCC 97-142, ¶27 (rel. April 18, 1997)).

15 In the *Bell Atlantic/NYNEX Order*, the FCC assumed that both companies had already been granted authority to provide in-region interexchange services pursuant to Section 271 of the Act. *Bell Atlantic/NYNEX Order* at ¶ 98.

distance service.[16] SBC and Ameritech also identify these three product markets as those that are relevant for purposes of their application. e.spire agrees.

b. Geographic Markets

In the *Bell Atlantic/NYNEX Order*, the FCC stated that "a geographic market aggregates those consumers with similar choices regarding a particular good or service in the same geographical area."[17] While SBC and Ameritech have identified only Chicago and St. Louis as the geographic areas where they arguably would compete against each other, e.spire submits that the FCC should modify the position it took in the case of Bell Atlantic/NYNEX and conclude that the relevant geographic market is everywhere SBC and Ameritech could have competed had they pursued their CLEC business independently of each other. The fact that SBC and Ameritech made only half-hearted efforts to expand their operations does not, in any way, diminish the fact that there are a number of markets in each of their respective territories beyond Chicago and St. Louis that would be viable for a CLEC. Thus, the Commission should recognize this reality when analyzing the merger.

2. Market Participants

SBC and Ameritech should be deemed to be significant potential competitors to each other throughout their regions. Despite their arguments to the contrary, the fact that SBC and Ameritech have premised their "National-Local Strategy" on their entry into each of the Top 30 major U.S. markets *outside the area in which it would be the incumbent carrier* is itself

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16 *Bell Atlantic/NYNEX Order* at ¶ 50.

17 *Bell Atlantic/NYNEX* Order at ¶ 54.

suggestive of the competition that has been precluded.[18] By proposing to merge, they have effectively reached an agreement not to compete in the markets they already serve.

SBC and Ameritech would have us believe that it is procompetitive for them to compete against BellSouth, US West, GTE and Bell Atlantic, but not for them to compete against each other. This is ludicrous. Moreover, their claim that it would be impossible for them to expand their operations as described without the consolidation is equally preposterous. Numerous CLECs, including e.spire, already have done so, without anywhere near the resources available to RBOCs such as SBC and Ameritech.

The ultimate problem with SBC and Ameritech's belief that they could not expand and compete on their own, is that they have not even tried. The Commission must not fail to factor in the elimination of head-on competition between SBC and Ameritech when evaluating the costs associated with this merger. e.spire respectfully suggests that it would be just as beneficial to have SBC and Ameritech compete against each other as it would be to have them jointly compete against everyone else.

3. Likelihood of Unilateral Anticompetitive Conduct

Another important aspect of the FCC's merger analysis considers "whether the merger will increase the likelihood of unilateral anticompetitive conduct by the merged entity or coordinated anticompetitive conduct of multiple market participants."[19] In the case of Bell Atlantic/NYNEX, the FCC found that the "proposed merger will limit or retard the development of competition" because it is likely to:

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18 *See SBC/Ameritech Application* at 5 (emphasis added).

19 *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI to WorldCom*, CC Docket No. 97-211, Memorandum Opinion and Order, FCC 98-255, 1998 FCC LEXIS 4774 ¶ 36 (1998).

(1) increase firms' ability to exercise market power unilaterally in the market for local mass market service in LATA 132;

(2) increase firms' ability to exercise market power unilaterally in the market for bundled local and interexchange services in LATA 132;

(3) increase the likelihood that firms will exercise market power through coordinated interaction; and

(4) adversely affect the dynamic development of competition in both local and bundled markets in LATA 132.[20]

Moreover, the Commission determined that "[t]he presence of other, less significant market participants is not likely to constrain such behavior" and that "additional entry that could occur in response to an exercise of market power is unlikely to have a constraining effect on such an exercise of market power."[21]

The FCC approved the Bell Atlantic/NYNEX merger nonetheless, justifying its decision by establishing conditions that Bell Atlantic/NYNEX would have to satisfy. But even with respect those conditions, the FCC stated that "the commitments made by Bell Atlantic, and made a condition of our approval of the merger, mitigate, but do not fully offset, the potential adverse effects of the merger on consumers in the relevant markets."[22]

In evaluating the SBC/Ameritech merger, the FCC must recognize that several significant factors dictate that a different conclusion be reached. First, the SBC/Ameritech merger (estimated value $62 billion) is more than twice the size of the Bell Atlantic/NYNEX merger (estimated value $25 billion). Second, SBC has already acquired two other ILECs – PacTel and SNET. Third, both SBC and Ameritech have an established record of anticompetitive conduct,

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20 *Bell Atlantic/NYNEX Order* at ¶ 100.

21 *Id.*

22 *Id.*

as discussed in more detail below. Fourth, "[i]f the deal goes through, SBC will become the largest local exchange service provider in the country, covering 13 states and approximately *one-third* of the local access lines nationally."[23] And finally, the degree of consolidation that already exists in the industry is very high.

4. The Potential Public Interest Benefits

The Commission noted in the *Bell Atlantic/NYNEX Order* that "as the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance services the public interest, convenience and necessity."[24] Given the degree of anti-competitive consequences likely to result from this proposed merger, the burden on SBC and Ameritech is very heavy. The Commission must carefully evaluate any claims as to what the public interest benefits would be, and whether they do truly offset the competitive harm.

C. SBC and Ameritech Have Failed To Demonstrate Adequately Why This Merger Is In The Public Interest

Despite their claims to the contrary, the SBC/Ameritech plan is not pro-competitive. It is not competitive because neither SBC nor Ameritech want to compete. They want to continue to ride the crest of monopoly revenues for as long as possible, avoiding difficult decisions and keeping themselves as far above the fray as possible. If SBC is permitted to acquire Ameritech, their plan will succeed. They will become a giant among giants, against which it will be nearly impossible to successfully compete, except on the margins.

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23 *Merger raises questions – SBC chairman grilled about Ameritech bid*, InternetWeek, (June 8, 1998)(emphasis added).

24 *Bell Atlantic/NYNEX Order* at ¶ 157.

In their Application, SBC and Ameritech justify this merger by claiming that

> [n]either SBC nor Ameritech could or would undertake the implementation of such a significant out-of-region and global expansion as a stand-alone company, *notwithstanding their belief that such an undertaking is essential and that it alone will produce demonstrable synergies and pro-competitive benefits.* Neither company, standing alone, has the breadth of experienced management and skilled technical personnel that such an undertaking requires, and it is simply not possible or feasible for either company alone to rapidly secure such personnel. Moreover, neither company individually could bear the financial risk and earnings dilution that the implementation of this strategy entails.[25]

Two things must be noted in this statement. First, regardless of the fact that SBC and Ameritech believe that their "National/Local Strategy" is "essential and that it alone will produce demonstrable synergies and pro-competitive benefits," they state that they would not, could not, do it independently. However, how is SBC and Ameritech's "National/Local Strategy" more ambitious than the plans implemented by CLECs such as MFS, Brooks Fiber and TCG as stand alone companies? e.spire itself has built 32 state-of-the-art fiber optic networks in the past five years and is planning to expand even further in the future. It is inconceivable that neither SBC nor Ameritech could accomplish this on their own. Except that we must note, secondly, that the critical factor against them even trying is that "neither [SBC nor Ameritech] could bear the financial risk and earnings dilution that the implementation of this strategy entails." Thus, because SBC and Ameritech are not willing to take any risk in order to build up their CLEC business, the FCC must permit them to merge into a single company that would control one-third of the access lines in the United States.

SBC and Ameritech argue that companies such as AT&T/TCG/TCI/World Partners, Sprint/Deutsche Telecom/France Telecom and MCI/WorldCom/MFS/Brooks/UUNet are all poised to seize market share from them. This may be true. But what SBC and Ameritech refuse to acknowledge is that all of these companies will succeed only if they offer a superior product. They did not, and do not, enjoy the benefits of a captive customer base. Nor do they have assets bought and paid for by almost a century of monopoly revenues sitting in the ground and in the bank. If they have achieved enviable market positions, it is not because they were unwilling to take a risk. The simple fact is that SBC does not want to do what its "competitors" did. It does not want to risk capital or make hard choices. SBC does not want to transform itself into a competitive company, because that would hurt too much. On the contrary, it is evident that the SBC/Ameritech plan is not to compete, but rather to make it too difficult for other carriers to compete against it. Such a plan is indefensible and fundamentally anticompetitive. If small start-up companies such as e.spire can find the resources to build networks and compete, then so too can SBC and Ameritech. And they can easily do it as stand-alone companies.

D. SBC and Ameritech Consistently Have Engaged in Anticompetitive Conduct

As stated previously, e.spire competes with SBC in five states and is in the process of expanding its CLEC business to compete against PacTel and Ameritech elsewhere. Thus, e.spire has had ample opportunity to witness first-hand the efforts that both SBC and Ameritech have made to facilitate the competitive processes implemented by the 1996 Act.

Earlier this year, e.spire participated in a proceeding before the Texas Public Utility Commission established to investigate whether SBC's Texas operating subsidiary, Southwestern Bell Telephone Company ("SWBT"), should be certified for entry in the interLATA

(...continued)
[25] *SBC/Ameritech Petition* at 7 (emphasis added).

telecommunications market.[26] In so doing, e.spire identified numerous instances where SWBT failed to fulfill its statutory and contractual duties with respect to interconnection and unbundling. Among the failures noted are:

- SWBT's failure to provide interconnection that is at least equal-in-quality to that which it provides itself, a subsidiary or any other party;
- SWBT's failure to implement adequate performance standards or the means to measure its performance for a significant number of CLECS;
- SWBT's failure to provide comparative reports on how it performs vis-a-vis other carriers;
- SWBT's failure to route expanded area service traffic ("metro traffic") without imposing access charges;
- SWBT's failure to provide unbundled elements in a manner that allows requesting carriers to combine such elements without assessing a separate charge for "access to UNEs";
- SWBT's failure to provide CLECs access to UNEs without requiring collocation;
- SWBT's failure to provide reciprocal compensation for transport and termination of traffic to Internet Service Providers who obtain local exchange services from CLECs; and
- SWBT's failure to provide meaningful options for collocation.[27]

In addition to these specific failures on the part of SWBT, e.spire noted that the public interest analysis inherent in the overall statutory scheme of the 1996 Act emphasizes the absolute need for the BOC to be demonstrably committed to competition.[28] Stating that SWBT has

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26 *See generally, Investigation of Southwestern Bell Telephone Company's Entry in InterLATA Telecommunications Market*, Project No. 16251, Public Utility Commission of Texas.

27 *Investigation of Southwestern Bell Telephone Company's Entry into the InterLATA Telecommunications Market*, Project No. 16251, Public Utility Commission of Texas, Affidavit of Charles H.N. Kallenbach, pp. 6-22 (filed April 1, 1998) (hereinafter "*Kallenbach Affidavit*") (appended hereto as Exhibit 1 without attachments).

28 *Id.* at 22-25 .

"delayed, obstructed, opposed, appealed and even defied PUC orders," e.spire observed that its "strategy is to grind down the opposition and, where necessary, the state regulators who stand in the way of continued local exchange dominance and total elimination of line of business restrictions."[29] SBC has adopted a "scorched earth" strategy and has succeeded in frustrating any real competitive entry to date. Importantly, the Commission itself has reviewed SBC's woeful record in implementing the Section 271 checklist, and has determined that it has failed.[30] SBC's record of abuse of its monopoly power will simply be extended if it is allowed to take control of Ameritech as well.

While e.spire's exposure to Ameritech is more limited, it already has witnessed first-hand Ameritech's reflexive drive to thwart the legitimate requests of CLECs. Specifically, when e.spire sought to adopt another carrier's existing agreement with Ameritech, in its entirety without change, as it is entitled to do under Section 252(i), Ameritech notified e.spire that adoption would be possible only if e.spire agreed either to (1) accept Ameritech's position on reciprocal compensation for ISP traffic or (2) place all amounts in escrow. It is not clear to e.spire what Ameritech will do now that a federal court has upheld the decision of the Illinois Commerce Commission requiring Ameritech to pay reciprocal compensation for ISP traffic. One thing is clear, however, Ameritech, like SBC, routinely ignores its express interconnection obligations, and can only be moved to implement critical provisions of the 1996 Act when a

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29 *Id.* at 22.

30 *Application of SBC Communications, Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Oklahoma*, 12 FCC Rcd 8685, Memorandum Opinion and Order (1997).

regulator or court directly orders it to do so. Notably, like SBC, Ameritech has been found to have failed to have implemented the Section 271 competitive checklist.[31]

In sum, neither SBC nor Ameritech has demonstrated even the slightest inclination to live up to their statutory and contractual obligations willingly. Nor have they demonstrated that they understand what a competitive industry is supposed to look like (*i.e.,* it is not supposed to look like enormous companies that are afraid to put any capital at risk). SBC and Ameritech want the future to be guaranteed for them – they think that merging is the way to do it. But a company that is unwilling to take risks, to make tough decisions, and to play fair, is not what Congress had in mind when it ushered in a new generation in telecommunications. If SBC and Ameritech do not want to compete, they do not have to. But they are not privileged to keep every one else from competing. e.spire wants to compete. e.spire is willing to compete. e.spire has taken the risks, built the networks, negotiated its agreements, and opened its doors for business. Now, e.spire asks the Commission to make sure that e.spire, and every other CLEC, has as much opportunity to succeed as Congress intended them to have.

II. IF APPROVED, THE SBC/AMERITECH MERGER MUST BE SUBJECT TO STRINGENT REQUIREMENTS

A. The Conditions Imposed on Bell Atlantic/NYNEX Are Only a Starting Point

If the Commission determines, as it did with the Bell Atlantic/NYNEX merger, that the SBC/Ameritech merger should be approved subject to conditions, e.spire submits that the conditions imposed must be far more stringent than those established for Bell Atlantic/NYNEX.

[31] *Application of Ameritech-Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in Michigan,* 12 FCC Rcd 20543, Memorandum Opinion and Order (1997).

As stated previously, a combined SBC/Ameritech will control one-third of the access lines in the United States. It will dominate local telecommunications in 13 states, including California and Texas, two of the most significant telecommunications markets in the nation. Their demonstrated tendencies to fight competition, to thwart their competitors, to fail in their statutory and contractual obligations, must be reigned in. This will only be accomplished by the imposition of stringent conditions and active enforcement. In the *Bell Atlantic/NYNEX Order*, the Commission imposed the following conditions:[32]

a. Bell Atlantic/NYNEX must prepare and provide Performance Monitoring Reports;

b. Bell Atlantic/NYNEX must provide uniform interfaces for use by carriers purchasing interconnection to obtain access to OSS;

c. Bell Atlantic/NYNEX must conduct operational testing of the interfaces used by carriers purchasing interconnection to obtain access to OSS;

d. Bell Atlantic/NYNEX must offer alternative payment options for non-recurring charges;

e. Bell Atlantic/NYNEX must provide shared transport as an UNE at usage sensitive rates that are based upon forward-looking, economic costs;

f. Bell Atlantic/NYNEX rates must be based upon the forward-looking, economic cost;

g. Bell Atlantic/NYNEX must engage in good faith negotiations with carriers purchasing interconnection in response to reasonable requests to establish performance standards subject to reasonable requirements governing mutuality of performance in the following areas:

- Pre-ordering, including the response time of the pre-ordering interface and the availability of the pre-ordering interface;
- Ordering, including the timeliness of order confirmation and order rejection notifications;

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[32] *Bell Atlantic/NYNEX Order* at Appendix C. A complete copy of the conditions is appended hereto as Exhibit 2.

- Provisioning, including the average provisioning interval offered, the average interval in which provisioning is completed, missed installation appointments'; and installation trouble reports received within 30 days;
- Billing, including the timeliness of the wholesale bill and the timeliness of the daily usage feed;
- Maintenance and repair functions, including the mean time to repair, missed repair appointments, and the percentage of repeat trouble report; and
- Network performance, including network blockage.

In addition to these conditions, the Commission must minimally require SBC and Ameritech to do the following:

a. Provide collocation options such as cageless collocation, adjacent collocation, shared collocation to requesting carriers; and

b. Provide UNE combinations, including "extended loop" and UNE Platform for residential accounts.

B. The FCC Must Take An Active Role In Enforcing The Conditions Imposed

This entire exercise will be meaningless if the Commission permits SBC to acquire Ameritech, imposes conditions on the merged company and then takes no further action to make sure that SBC and Ameritech are complying with the Commission's mandate. The Commission is the agency charged by Congress with the job of implementing the 1996 Act. This requires the Commission to actively monitor the state of competition, and to take quick and decisive action when confronted with a clear case of anti-competitive conduct. e.spire does not support the merger of SBC and Ameritech, and does not believe that any conditions will effectively address the anti-competitive tendencies exhibited by both companies. However, should the Commission decide to approve this merger subject to conditions, it must also accept responsibility for ensuring that SBC and Ameritech live up to the bargain.

Conclusion

On the basis of the foregoing, e.spire respectfully submits that current circumstances dictate denial of the SBC/Ameritech petition. The alarming trend towards consolidation of monopolists to achieve growth, rather than growth through forays into competitive markets, must end. It is time for the Commission to say that "enough is enough," and to tell SBC to get on with the business of competing – instead of reinforcing its position as the industry's most formidable monopoly. e.spire urges the Commission to find that SBC and Ameritech have not met the "heavy burden" they carry in demonstrating that the public interest will be served by this merger, for they have not.

Respectfully submitted,

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Dated: October 15, 1998

ACSI

Project No. 16251

INVESTIGATION OF	§	
SOUTHWESTERN BELL TELEPHONE	§	PUBLIC UTILITY
COMPANY's ENTRY INTO	§	
THE INTERLATA	§	COMMISSION OF TEXAS
TELECOMMUNICATIONS MARKET	§	

AFFIDAVIT

OF

CHARLES H.N. KALLENBACH

ON BEHALF OF

ACSI

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April 1, 1998

I. INTRODUCTION

My name is Charles H.N. Kallenbach. I am the Vice President -- Regulatory Affairs at ACSI, the parent of ACSI Local Switched Services, Inc. ("ACSI LSS") and ACSI's other Texas local operating affiliates. My business address is 131 National Business Parkway, Suite 100, Annapolis Junction, Maryland 20701. I joined ACSI in April 1996. Prior to joining ACSI, I worked with the Washington, D.C. law firm of Swidler & Berlin, where I represented competitive access providers, competitive local exchange carriers, international and domestic common carriers and cable operators, specialized carriers, and information service providers. Previously, I was associated with the D.C. office of Jones, Day, Reavis & Pogue. I am a *cum laude* graduate of the University of Pennsylvania and received my law degree from the NYU School of Law. I am admitted to practice law in Pennsylvania and the District of Columbia.

I will provide evidence addressing the extent to which SBC, Southwestern Bell Telephone Company and its affiliates (hereinafter "SBC" or "SWBT")[1] have met the requirements and prerequisites set out in the federal Telecommunications Act of 1996 ("FTA96") § 271 for BOC entry into the in-region interLATA market, including the "public interest" standard.

II. DESCRIPTION OF ACSI

ACSI, through its operational subsidiaries, provides competitive access and local exchange services in thirty-two markets in the South and Southwest of the United States. ACSI also provides a wide range of data communications services nationwide. ACSI's local affiliates

[1] SBC and its affiliates have styled their applications in some states as if the applicant is Southwestern Bell Telephone Company ("SWBT"), and has asserted that the parent and its subsidiaries other than SWBT are not parties or amenable to discovery. ACSI disagrees. The real party in interest in this case is SBC. The SBC long distance affiliate and other affiliates required by §§ 271 and 272 will be the entities that provide interLATA services if the application is granted. While I may at times refer to SWBT, ACSI contends that SBC is the real party in interest and any reference to SWBT should not be considered a waiver of that point.

provide service using a combination of our own facilities, collocation and ILEC UNEs in Austin and the Dallas-Fort Worth metropolitan area; we presently provide resold only services in several cities, including Amarillo, Corpus Christi, Houston and El Paso, while we construct our local networks. ACSI recently started providing limited 1+ interLATA services in its region. At this time, ACSI resells the long distance services of an interLATA carrier.

III. OVERVIEW OF THE 271 PROCESS

The PUC should consider SBC's application consistent with the standards and criteria stated in § 271, as explained and applied in the four § 271 cases already decided by the Federal Communications Commission ("FCC").[2] The states have an essential role in that they are most aware of local circumstances by virtue of their proximity to the scene, because they conduct arbitrations and therefore establish prices, terms and conditions for interconnection, collocation, resale and UNEs, and because they certify competitive carriers. *See*, *Ameritech Michigan* at ¶¶ 30-34. The FCC pays close attention to the findings and recommendations of the affected state, so it is vitally important that a complete record be developed at this level. It is even more important that the state carefully analyze SBC's claims and compare it to the BOC's actions. Above all else, this Commission should pay more attention to "what Bell does" than "what Bell says." Its actions (and inactions) speak much more loudly than its words.

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[2] *See Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, FCC 97-228, (rel. June 26, 1997) ("SBC - Oklahoma"); *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137 Memorandum Opinion and Order. FCC 97-298 (rel August 19, 1997) ("Ameritech - Michigan"); *Application of BellSouth Corp. et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, FCC 97-418 (rel. Dec. 24, 1997) ("BellSouth - South Carolina"); *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231; Memorandum Opinion and Order, FCC 97-231(rel. February 4, 1998) ("BellSouth - Louisiana")

Moreover, this Commission should remember that SBC has the initial and ultimate burden of proof, and be aware of what must be proven. As the FCC has stated:

> Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. In the *Ameritech Michigan Order*, the Commission determined that the ultimate burden of proof with respect to factual issues remains at all times with the BOC, even if no party opposes the BOC's application. In the first instance, a BOC must present a *prima facie* case in its application that all of the requirements of section 271 have been satisfied. Once the applicant has made such a showing, opponents of the BOC's entry must, as a practical matter, produce evidence and arguments necessary to show that the application does not satisfy the requirements of section 271, or risk a ruling in the BOC's favor. Nevertheless, the BOC applicant retains at all times the ultimate burden of proof that its application is sufficient. The Commission also concluded that, with respect to assessing evidence proffered by a BOC applicant, the "preponderance of the evidence" standard is the appropriate standard for evaluating a BOC section 271 application. The Commission further concluded that, "if the Department of Justice concludes that a BOC has not satisfied the requirements of sections 271 and 272, a BOC must submit more convincing evidence than that proffered by the Department of Justice in order to satisfy its burden of proof.

BellSouth South Carolina at 37 (footnotes omitted).

Note the required showing: the BOC must show all § 271 requirements <u>**have been satisfied**</u>. For example, SBC must demonstrate in its application that:

> it "is providing access and interconnection" and that it "**has fully implemented** the competitive checklist." The Commission concluded that "a BOC 'provides' a checklist item if it **actually furnishes** the item at rates and on terms and conditions that comply with the Act." Alternatively, the Commission concluded that, where no competitor is actually using the item, the BOC must show that it makes the checklist item available "as both a legal and practical matter." To be "providing" a checklist item, "a BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item." In addition, the BOC must demonstrate that it is "**presently** ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality." Evidence of actual commercial usage of a

> checklist item is most probative, but a BOC may also submit evidence such as carrier-to-carrier testing, independent third party testing, and internal testing to demonstrate its ability to provide a checklist item.

Id . ¶ 78 [emphasis added]

Section 271(d)(2)(B) directs the FCC to "consult with the State commission...in order to verify the compliance of the (BOC) with the requirements of subsection (c) of [§ 271]." The state's role, therefore, is to assist the FCC in its determination of whether the BOC is in ***present*** compliance. Both the state and the FCC are to consider if, at the time the application is filed and based on the application itself and the submissions of the other participants, the BOC is ***presently meeting*** its statutory obligations and ***is*** otherwise entitled to enter the interLATA market. The tense chosen by Congress and the FCC clearly demonstrates that this issue is present compliance. SBC cannot receive interLATA authority based on promises of future actions or predictions of future events. *Ameritech - Michigan* ¶ 55.

I will demonstrate below that SBC falls far short of present checklist compliance in several specific areas.[3] The rest of this Affidavit will address specific checklist items in the order they are presented in FTA96. In each segment, I will summarize the statutory requirement, correlate the statutory provision with the FCC's decisions, and present specific information concerning other authorities or local conditions. Again, let me note that any failure to address any item does not constitute concurrence that SBC meets the criteria for that item.

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[3] My testimony will focus on certain specific items, but ACSI's relative silence in other areas does not signify concurrence that SBC meets the statutory criteria for those we do not specifically address. We have merely chosen to address a few since they are more than sufficient to warrant a recommendation that the application be denied.

III. CHECKLIST ITEMS

A. *Interconnection in accordance with §§ 251(c)(2) and 252(d)(1) [FTA96 § 271(c)(2)(B)(i)]*

Although ACSI has an interconnection agreement with SWBT in this state, SWBT is not fulfilling its statutory or contractual interconnection requirements.

Section 251(c)(2) requires SWBT "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access." Such interconnection must be: (1) provided "at any technically feasible point within the carrier's network;" (2) "at least equal-in-quality to that provided by the local exchange carrier to itself or . . . [to] any other party to which the carrier provides interconnection;" and (3) provided on rates, terms, and conditions that are "just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [§ 251] . . . and section 252."

The equal-in-quality standard of § 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, or any other party." SWBT must design its "interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within [its] . . . own network[]." Moreover, the equal-in-quality obligation is not limited to quality perceived by end users.[4]

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[4] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, 11 FCC Rcd 15499, 15635 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.*, 1997 WL 403401 (8th Cir., July 18, 1997) (*Iowa Utils. Bd.*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996) (*Local Competition First Reconsideration Order*), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996) (*Local Competition Second Reconsideration Order*), *Third Order on Reconsideration and Further Proposed Rulemaking*, FCC 97-295 (rel.

Unfortunately, ACSI has no way to measure SWBT's performance on this issue because SWBT provides no reports on how it performs for ACSI and how it performs these functions for itself. The Commission has received some information from CLECs. I believe that information will show, at best, that the Commission cannot state that SWBT is ***presently*** meeting this checklist item. SBC therefore fails checklist item (i).

SWBT is also not transmitting or routing some of ACSI's calls. Absent a specific statutory obligation, there is no guarantee that the incumbent will complete calls from the new entrants' networks, and send calls to new entrants' networks. Congress ensured that traffic would actually be exchanged by requiring not only interconnection [5] but also by providing that CLECs would have equal rights with regard to "the transmission and routing of telephone exchange service and exchange access." § 251(c)(2)(A).[6] Since all traffic is either "exchange service" or "access service" SWBT must transmit and route all traffic presented to it by ACSI, and must also deliver all traffic destined to ACSI's customers that originates on or transits SWBT's network. The Company must transmit and route traffic on a nondiscriminatory basis (§ 251(c)(2)(C)), and specifically must implement dialing parity pursuant to § 251(b)(3).[7] SWBT is not meeting these

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Aug. 18, 1997) (*Local Competition Third Reconsideration Order*), *further recon. pending*; 47 C.F.R. § 51.309. The "equal-in-quality" interconnection requirement is found in the FCC's rules, 47 C.F.R. §§ 51.305(a)(3). The FCC specifically applied this test in the context of Ameritech - Michigan's application, and found Ameritech did not provide equal and nondiscriminatory interconnection. *Ameritech - Michigan* at ¶¶ 223-224.

5 "Interconnection" is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic. 47 C.F.R. § 51.5 (definitions). To ensure that competition would have a chance of survival, Congress had to also ensure that traffic would flow over the connections.

6 I will discuss reciprocal compensation for the traffic that is exchanged later in my testimony. For the moment I am discussing only the requirement that SBC actually transport and terminate ACSI's traffic on a nondiscriminatory basis.

7 Dialing parity is a separate checklist requirement under FTA § 271(C)(2)(B)(xii). I will, however, address the issue here rather than below, since the two are related.

requirements at present in Texas with regard to transmitting and routing metro numbers in the Dallas/Fort Worth metropolitan area.

ACSI applied for and received from SWBT, *qua* number administrator, a block of "metro" numbers. Metro service is a type of expanded area service. Customers who purchase metro service are able to send and receive calls to and from a large metropolitan area comprising several local calling areas. These customers do not incur toll charges, nor do people who call them. This is not a "toll package" that merely gives a discount for outbound long distance calling. The service allows toll-free two-way calling, and there is a separate block of NXXs -- central office codes -- that are used to recognize, route and transmit calls to and from metro customers. Metro service is not toll, and does not involve exchange access. In fact, the whole purpose is to avoid exchange access, and therefore toll charges.

Although SWBT (the number administrator) issued the numbers, SWBT (the local carrier) has refused to program its switches and network systems to properly recognize, route and transmit ACSI's metro numbers in the same fashion the Company recognizes, routes and transmits its own metro service and that provided by other incumbent LECs in the metro area.

When a SWBT customer in the metro area calls an ACSI metro customer, SWBT's system refuses to route the call. The call is not completed, and the caller receives an instruction to dial 1+. When the customer dials 1+, it is treated as a toll call, and SWBT imposes access charges. This is not metro service.

ACSI's Interconnection Agreement with SWBT addresses metro calling. The relevant terms, which we believe require SWBT to recognize our metro numbers and properly recognize, route and transmit them as such, are appended to this Affidavit as Attachment 1. SWBT, however, has repeatedly refused to program its network to do so, despite our numerous requests.

Section 251(c)(2) of the Act requires SWBT to interconnect with ACSI's network and to provide transmission and routing that is at least equal in quality to that provided by SWBT to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. SWBT routes metro calls for its users, and for other ILECs in the metro area, without the requirement that the user dial 1+, and without imposition of access charges. Requiring users to dial extra digits for ACSI's metro service when it is not necessary with SWBT's metro service, and imposing access charges when they do not apply to SWBT and other ILEC users, violates the dialing parity requirement and is discriminatory, unequal and unreasonable, in violation of § 251(c)(2).

I have demonstrated SWBT is not meeting the requirements of § 251(c)(2) for at least two separate reasons. SBC therefore fails checklist item (i).

B. *Nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1) [FTA96 § 271(c)(2)(B)(ii)]*

SBC simply cannot show that it offers "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." Nor does SBC presently fulfill the duty in § 251(c)(3) "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of [§ 251] . . . and section 252." Section 251(c)(3) further provides that an incumbent LEC "shall provide such unbundled elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." SBC is retreating on combinations; its present proposals and legal position, if allowed, would make it virtually impossible and horrendously expensive for ACSI to combine UNEs. ACSI would often have to wait months to merely combine loop and transport for a single customer, and it appears that SBC is reserving the right to refuse to allow combination in certain circumstances.

The Company has presented testimony on its combination policy[8] and contends that policy meets legal requirements. ACSI strongly disagrees.[9]

SWBT now describes the function it is performing as allowing "access to UNEs." While this terminology is consistent with both the Act and FCC rules, the means by which SWBT has chosen to implement them are unnecessary, burdensome, costly, onerous and would in many instances deny access to UNEs for a significant period, if not permanently.

Mr. Deere acknowledges that CLECs may obtain access to unbundled network elements at any technically feasible point on just, reasonable and nondiscriminatory terms,[10] separate from other UNEs and for a separate charge, and in a manner that will not impair a CLEC's ability to provide any telecommunications service. This too is consistent with both the statute and the FCC rules. The Company completely undoes all these general promises with its specific terms,

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8 *See*, Affidavit of William C. Deere ("Deere aff.") ¶¶ 42-50 (acknowledging general obligations described above); 84-113 (describing how SWBT provides "access to UNEs").

9 ACSI's existing agreement with SWBT in Texas requires SWBT to combine elements; indeed, ACSI is contractually prohibited from combining and must allow SWBT to do so. The price ACSI pays for combinations includes an increment to recover SWBT's costs of performing the combination. SWBT, however, has indicated in several *fora* that it will no longer voluntarily combine and the combination provision in its agreement with ACSI is void. SWBT has not made a specific proposal to ACSI to amend the agreement, but we anticipate that at some point this will occur and SWBT will attempt to impose its general policy on ACSI. Since SBC relies on its policy for all CLECs other than AT&T and MCI (*see*, Loehman aff. ¶ 34), and not the agreement with ACSI, we will address the significant shortcomings with that policy under §§ 251(c)(3) and 252(d)(1).

10 Deere aff. ¶ 42. Mr. Deere also acknowledges the nondiscrimination standard, including the concept that SWBT must provide access to a CLEC that is no less favorable than the access SWBT provides to itself. This too is consistent with the FCC rules. *See*, 47 C.F.R. §§ 51.311(b), 51.313(b).

however. I will demonstrate below that the combination policy clearly violates both the Act and the FCC rules.

A careful review of SWBT's proposal to provide "access to UNEs" reveals that SWBT has actually created a new UNE called "access to UNEs."[11] Although neither Mr. Deere nor Mr. Loehman mention this. SWBT has proposed in at least one state to assess a separate charge for "access to UNEs. *See. e.g.*, Arkansas proposed SGAT, Appendix UNE ¶¶ 11.0-12.4; Attachment UNE - Rates, Sheet 1. (Attachment 2 to this Affidavit). If SWBT does intend to charge in Texas, we do not know the price, or whether it is a standard price or ICB. If the price is standard, there is no cost support; if it is ICB it suffers from the same problem as BellSouth's "access" proposal. *See, BellSouth - South Carolina* at ¶¶ 203-205. Either way, if SWBT intends to charge for "access to UNEs" it fails the checklist and the PUC has no choice but to recommend denial.

SWBT will "extend UNEs" to a POT Frame, a UNE Frame in a collocation common area or some other area, or an external point of presence such as a cabinet outside the CO but on SWBT property. The CLEC can also provide the extension itself to a non-SWBT premises and have SWBT make the connection to SWBT's frame. Deere aff. ¶¶ 86-90; Loehman Schedule H, ¶ 2.9.1.

The entire concept underlying SWBT's policy is flawed. The Company tries to finesse by claiming it is merely "extending" the UNE to the designated point, but the imposition of a separate charge makes it clear that "access to UNEs" is a UNE in and of itself, just as was the original cross-connect. A CLEC that desires a UNE (such as a loop) must now __also__ purchase "access." The Act and FCC rules do not allow or even contemplate this approach. In the first

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[11] In actuality. SWBT has merely renamed the old cross-connect element previously used to connect loops to collocation cages and dedicated transport. *See*, Deere aff. ¶¶ 94-97.

place, this is bundling access with the UNE, but imposing two separate charges. A loop is no longer simply a loop, which is defined in 47 C.F.R. 51.319(a) as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises." *See also*, Deere aff. ¶ 62. To "facilitate" CLEC access, SWBT extends the loop past the distribution frame, in violation of the FCC definition.[12]

47 C.F.R. § 51.315(a) requires SWBT to "provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service." This rule does not contemplate that CLECs must purchase another UNE – access – in order to obtain access to a UNE. When SWBT provides a UNE, it must allow the CLEC to combine the UNE with other UNEs. The Company cannot require the CLEC to pay more for access (and for a separate charge), nor can SWBT make access itself into a UNE.

For this reason the rebundling also violates 47 C.F.R. § 51.307(a), (b) and (d). Subsection (d) is violated since a CLEC cannot obtain "access" to a loop UNE without also buying the "access UNE" as well. The two UNEs are not functionally separate. The "access" UNE (in reality the illegal extension of the UNE) also prevents CLECs from obtaining access "at any technically feasible point" – such as directly at the MDF – contrary to subsection (a).[13] In total,

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[12] SWBT may argue that the point of access is the "equivalent" of the distribution frame. The problem with this argument is that SWBT will not terminate *its* loops at this "equivalent." SWBT's retail loops will remain at the MDF. Nor will the quality of access be the same as between CLECs and SWBT, since there will be an additional access requirement and attendant cost. This violates the nondiscrimination standard stated in 47 C.F.R. §§ 51.311(b) and 51.313(b).

[13] SWBT will probably claim CLECs cannot be allowed to access a loop at the MDF because of security and network integrity concerns, and therefore it is not technically feasible. The Company, however, has not provided <u>any</u> evidence, much less "clear and convincing evidence" that access to the MDF by CLECs must be denied because of "significant adverse network reliability impacts." Nor has SWBT shown that potentially lesser burdensome alternatives, such as allowing CLECs to perform combinations at the MDF only when escorted by SWBT personnel, are not feasible. *See also*, 47 C.F.R. § 51.321(a).

this aspect of the proposal violates FTA96 § 251(c) In addition, since the "access" is effectively bundled with the UNE itself, then the additional charge for "access" violates the cost-based standard in FTA96 § 252(d)(1)(A).[14]

Methods 1 and 2 apply only when the CLEC is physically collocated in the relevant central office. Deere aff. ¶¶ 86, 87; Loehman Schedule H, ¶¶ 2.9.1.1, 2.9.1.2. In these two "options" SWBT "extends" the UNE to the POT frame in the CLEC's collocation space or to a common "UNE" frame in a common collocation area. It is in these instances where SWBT is clearly substituting the "access" concept for what were formerly known as cross-connects.

The most onerous and unreasonable proposals occur in the situation where the CLEC is not physically collocated in the CO where the UNE is terminated, such as where a CLEC combines loop and transport. These are SWBT's "Methods" 3, 4 and 5.[15] Deere aff. ¶¶ 88-90; Loehman Schedule H, ¶¶ 2.9.1.3, 2.9.1.4, 2.9.1.5. ACSI must be able to order a loop and then connect that loop to transport to haul traffic from end users' loops to ACSI's collocation site in a different CO, or to its own switch. This connection of loop to transport is essential to ACSI's ability to provide service to users connected to an SWBT CO in which ACSI is not collocated. Given the high cost (as well as the long intervals) of physical and virtual collocation, ACSI cannot afford collocation in every CO, which is the only other alternative. SWBT's Methods 3, 4 and 5 are wholly unreasonable.

[14] Even if the added charge for access is allowed, the "access" element must itself be based on the cost of providing "access." SWBT has the burden to prove its proposed "access" rate is cost based under the appropriate cost standard, but provided absolutely no cost support for the proposed charges. As noted, Messrs. Deere and Loehman did not provide any indication of the price or any cost support.

[15] ACSI cannot determine how CLECs with virtual collocation will be treated. They cannot use Methods 1 and 2, but requiring the CLEC to go to a common area does not make sense in a virtual collocation environment, since SWBT is maintaining and operating the virtually collocated equipment, and virtual collocation is not a UNE.

SWBT claims the right to deny (or at least delay for a significant period) the right to order and use a UNE (such as loop or transport) when the particular CO to which the loop or the transport is terminated is attached does not already have the "Method" 3 or 4 space prepared and available. If the common areas described in Methods 3 and 4 are not in place, then "facilities and equipment are not available" and SWBT will "not be required to provide UNEs." *See*, Loehman Schedule H, ¶ 2.9.1. This is made absolutely clear in the technical publication attached to Mr. Deere's testimony.[16] Under its policy, SWBT can deny provision of UNEs to the first CLEC to order an unbundled loop in a CO. To be able to use UNEs out of that CO, the first CLEC will be required to use the Bona Fide Request process. The standard time lines and charging provisions in the Bona Fide Request process apparently apply.[17]

A CLEC desiring to obtain an unbundled loop for a customer, and connect it to transport to collocation space in a different CO will have to issue a request in writing, including a technical description and the desired quantity. Access Tech. Pub. ¶ 3.D.1. SWBT acknowledges receipt within 10 days and delivers a price quote. Loehman Schedule H, ¶ 2.9.2.2. SWBT then has the explicit right to "ordinarily" delay establishment of the common area for at least 90 days. *Id.* ¶ 2.9.2.5.

16 *See*, *Technical Publication for Access to Unbundled Network Elements* ("Access Tech. Pub."), Issue 1, January 29, 1998. Paragraph 2.1 of that document states that "[a]ccess to UNE is available on a non-discriminatory, first-come, first-served basis subject to the availability of space and facilities where required by law." Further, ¶ 6.A.1 indicates the Company will not relinquish space subject to forecasted SWBT needs, nor will it construct building additions or new facilities. SWBT is therefore claiming that it only has to provide as much access as it presently has space to give in a CO, and that where there is no space, there is, and there will never be, access. The Company has an incredible incentive to find no space, since that means absolutely no access to any UNE at that CO.

17 An interesting question is whether the entire "common" area SWBT sets aside for the first CLEC would be reserved for that CLEC's sole use, since the CLEC paid for it. The Bona Fide Process is for UNEs and when a CLEC obtains a UNE it has the exclusive right to that UNE to the exclusion of all others. 47 C.F.R.§ 51.309(c); Deere aff. ¶ 48.

Of course, the CLEC causing SWBT to construct the common area (which ACSI contends is unnecessary and inefficient to begin with) must pay SWBT the entire cost of constructing the common area. Further, the pricing is "ICB." Access Tech. Pub. ¶ 3.D.2. Loehman Schedule H. ¶ 2.9.2.18.1. The FCC found that BellSouth's proposal to allow access to UNEs by requiring collocation was deficient because that BOC's use of ICB for access to UNEs through collocation did not contain certain and definite costs and required individual negotiations.[18] *BellSouth - South Carolina* at ¶¶ 203-205. SWBT's combination policy suffers from the same defect.

SWBT's reference to the Bona Fide Request process makes it clear that even the Company agrees that "access" to UNEs is itself a separate UNE under the proposal.[19] It also illustrates the unreasonableness and illegality of the proposal. Both SWBT and the first CLEC will have the perverse incentive to size the "common area" so that only a single CLEC can use it. Each new CLEC desiring to serve unbundled loops out of a CO will therefore have to construct its own common area. SWBT has effectively required a CLEC to be collocated (or to have its own facilities and use Method 5) in order to use an unbundled loop. This directly violates the 8th Circuit's decision upholding the FCC's determination that CLECs can provide service using only UNEs.

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[18] SWBT's terms and conditions are strikingly similar to SWBT's policy on collocation, including the requirement that the CLEC have $1,000,000 in insurance coverage before its personnel can step in the door to combine a single UNE. SWBT also requires that the CLEC take responsibility for "servicing, repairing, installing and maintaining the cross connect on the UNE Frame used to combine UNE" Access Tech. Pub. ¶3.A.1. SWBT has effectively required a CLEC to be collocated (or to have its own facilities and use Method 5) in order to use an unbundled loop. This is obviously in violation of the 8th Circuit's decision upholding the FCC's determination that CLECs can provide service using only UNEs and do not have to own or control some portion of a telecommunications network before being able to purchase unbundled elements.

[19] The Bona Fide Request process is used only for UNEs. *See*, Deere aff. ¶ 58.

The up-front cost to the first CLEC will likely cause CLECs to not expand service beyond those COs in which they are collocated. They will certainly not take "small" customers. Only if the CLEC can reasonably be assured that it will be able to "fill" the demand necessary to justify the initial investment (which is, of course artificial and unnecessary) will the CLEC even consider expanding service to a new area. No CLEC can "sell" a customer when it is not clear when or even if the CLEC can begin to provide service. This is not the way to encourage competition to all segments of the customer base.

SWBT's "access to UNEs" policy is clearly designed to and will in fact deny and delay competition.[20] In the guise of "incorporating the terms of the 8th Circuit Order" SWBT has devised onerous, anticompetitive, discriminatory and unreasonable terms, conditions and prices. SBC does not presently provide reasonable, cost-based and nondiscriminatory access to UNEs.

C. Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services [FTA96 § 271(c)(2)(B)(v)].

As I have just described in some detail, SWBT does not offer local transport from the trunk side of the switch that is truly unbundled from other elements. The Company created a new UNE called "access" and bundled it with all UNEs that a CLEC wishes to combine with another UNE such as transport. Because CLECs are forced to obtain combinations in this inefficient and burdensome manner, this element, in effect, is not offered by SWBT.

[20] The FCC noted in *BellSouth - South Carolina* that it "and the industry are still in the early stages of evaluating the implications of the Eighth Circuit's ruling that, although competing carriers may offer services solely through the use of unbundled network elements, the competing carriers must combine those elements themselves. Various methods of combining elements are being discussed by the industry." *BellSouth - South Carolina* at ¶ 197. The uncertainty itself concerning how combinations will be accomplished inhibits competition. That uncertainty will not be removed until the combination issue is finally resolved on reasonable terms.

D. Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) [FTA96 § 271(c)(2)(B)(xiii)].

Checklist item (xiii) requires that SBC show it has reciprocal compensation arrangements that meet § 252(d)(2).[21] Section 251(b)(5) also imposes the duty that LECs "establish reciprocal compensation arrangements for the transport and termination of telecommunications." SWBT has a reciprocal compensation arrangement with ACSI, but is engaged in a campaign to wholly abrogate the terms with regard to calls from users to Internet Service Providers (ISPs)[22] who obtain local exchange service from CLECs. SWBT is refusing to compensate CLECs for the transport and termination services they provide to SWBT when SWBT end users call ISPs.

Every state that has considered the issue has determined that calls to ISPs in the same exchange as the calling party are "local" and therefore subject to reciprocal compensation. This includes Oklahoma and Texas. SWBT, however, has obstinately continued to refuse to acknowledge the requirement. This Commission recently ruled on the point in two separate arbitrations. *Petition by Waller Creek Communications, Inc. For Arbitration With Southwestern Bell Telephone Company*, Docket 17922; *Complaint and Request For Expedited Ruling of Time Warner Communications*, Docket 18082. Yet SWBT will not recognize the rulings and continues

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[21] Section 252(d)(2) provides that for

> purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

[22] The FCC calls entities that provide access to the Internet "Internet Access Providers" or "IAPs". I will use ISPs, even though the FCC uses "ISP" to denominate "Information Service Providers" of which "IAPs" are a subgroup.

to refuse to treat ISP traffic as local. The Company has told CLECs that they must individually seek arbitration. To date SWBT has not paid reciprocal compensation in any significant amount to any CLEC because it still claims -- in the face of all the national precedent -- that "ISP traffic" is not subject to local reciprocal compensation. This is a blatantly anticompetitive act that threatens the viability of many CLECs. Unless and until SWBT follows the law it must be deemed to have failed checklist item (xii).

IV. COLLOCATION

Although collocation is not explicitly included on the checklist, the FCC has indicated its belief that collocation "is analogous to access to OSS functions in that it is essential to the provision of unbundled network elements." *BellSouth - South Carolina* at ¶ 200. Given SWBT's refusal to combine Loop and Transport elements, collocation becomes a matter of life and death for CLECs.

One would expect that if SWBT effectively refuses to combine loops and transport, but nevertheless believes in encouraging local competition, the Company would implement quick and inexpensive collocation. In that way, CLECs could efficiently extend their networks to connect with unbundled local loops of customers in more end offices instead of requiring UNE combinations. The truth is that SBC has fought physical collocation as hard as all other aspects of competitive entry. And, of course, the BOC consistently missed due dates for quotes and "finish outs" of collocation spaces for each of ACSI's locations.

IV. THE PUBLIC INTEREST TEST [FTA § 271(d)(3)(C)]

The final issue is whether the "requested authorization is consistent with the public interest, convenience, and necessity." In my opinion, allowing SBC to provide interLATA service at this time would be wholly inconsistent with the public interest.

The FCC has not yet fully addressed the public interest standard in the context of a § 271 application. It has encouraged the DOJ's general approach, however, including DOJ's assessment that performance measures are an essential part of the public interest inquiry. *Ameritech - Michigan* ¶ 42. The FCC gave a general indication of its preliminary public interest approach in *Ameritech - Michigan* ¶¶ 381-402.

I will present information and analysis that basically follows the FCC's discussion in *Ameritech - Michigan*. First, however, I will discuss performance monitoring, which both the DOJ and FCC have found to be an important part of several checklist items and the public interest test.

A. PERFORMANCE MONITORING

Performance standards are critical in several important parts of the Section 271 evaluation. In the Ameritech Michigan 271 Order, the FCC rejected the Ameritech petition based, in part, on the failure of Ameritech to provide sufficient data by which the FCC could compare the quality of the interconnection that BOC provides to CLECs with that which it affords to itself. *Ameritech - Michigan* at ¶232.

Second, performance standards are critical to an evaluation of a BOC's OSS. As the FCC indicated in its *BellSouth South Carolina* 271 Order, "an examination of a BOC's OSS performance is necessary to evaluate compliance with section 271(c)(2)(B)(ii) and (xiv)." *BellSouth South Carolina* at ¶ 83. Additionally, the second part of the FCC's inquiry into a BOC's OSS – whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter – includes an examination of performance measurements. *BellSouth South Carolina* at ¶ 96.

Third, performance standards are part of the evaluation of whether a BOC's Section 271 petition is in the public interest, convenience and necessity. In the Ameritech Michigan 271 Order, the FCC ruled that:

> [E]vidence that a BOC has agreed to performance monitoring (including performance standards and reporting requirements) in its interconnection agreements with new entrants would be probative evidence that a BOC will continue to cooperate with new entrants, even after it is authorized to provide in-region, interLATA services. Performance monitoring serves two key purposes. First, it provides a mechanism by which to gauge a BOC's present compliance with its obligation to provide access and interconnection to new entrants in a non-discriminatory manner. Second, performance monitoring establishes a benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service once a BOC is authorized to enter the in-region, interLATA services market.

Ameritech Michigan at ¶ 393. Part and parcel of the performance standards are "self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards." *Id* at ¶ 394. Such enforcement mechanisms would be "automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention." *Id.*

Performance standards" are not a discrete checklist item, although they impact all checklist items indirectly. Performance monitoring is the best means by which SBC's fulfillment of the substantive requirements can be determined, and SBC cannot meet the public interest standard until it has enacted adequate performance monitoring. SWBT does not at present have adequate performance standards or the means to measure its performance for a significant number of CLECs. Although this Commission enacted a set of standards and measurement techniques in an arbitration involving AT&T and MCI, the standards and measures are not applicable to and do not generally and specifically benefit other CLECs, including ACSI.

I believe there must be a fairly uniform set of measurement methods in place by which to gauge SWBT's compliance with statutory and contract requirements. In addition, an adequate period of time must pass so that it can be determined whether SWBT is actually meeting reasonable performance goals. Only then will it be more objectively possible to see if SBC meets many of the checklist items. At this time the state and FCC must rely on specific problems related to them by CLECs. This is time-consuming and not as readily verifiable as objective standards and reasonable measurement and reporting methods.

I understand SBC recently made a commitment to implement performance measures, although I do not believe these measures have been formally implemented. Certainly an insufficient amount of time has passed to determine if SWBT is meeting any actual standards as measured by the agreed methods. The Department of Justice has received a commitment in principle from SBC to certain measures and the DOJ has in turn stated (with some very important qualifications) that those measures, if properly implemented, may be satisfactory for purposes of DOJ's application of the competitive standard it has devised under § 271.

The measures listed in the DOJ's letter to SBC are inadequate, however, to provide CLECs, or this Commission, with sufficient information on whether SBC has met its Section 271 obligations. Importantly, the DOJ/SBC measures, on their face, do not meet the FCC's requirements for performance standards, nor are they as comprehensive as those in the revised AT&T/SWBT agreement, especially with regard to ordering and provisioning UNEs. Further, SBC has merely committed to implement the <u>measures</u>. We do not yet have generally applicable <u>standards</u>, nor has an adequate amount of time passed to see if , based on actual performance, SBC <u>meets</u> the yet-to-be established standards based on hard data.

Attachment 3 to this Affidavit is a set of performance standards and measurements proposed by the Association for Local Telecommunications Services (ALTS). ACSI supports these as the minimal requirements necessary for SWBT to provide to facilities-based CLECs. The Commission should adopt these standards for the entire facilities-based CLEC industry, and require SWBT to use the measurement methods contained in the ALTS document and report the results to the Commission. We will not actually know how SWBT performs until sufficient time has passed and enough results are generated.

B. CORPORATE ATTITUDE

Performance monitoring is merely one objective method to test the public interest. There are other essential consideration factors as well. The FCC explained a few of them in *Ameritech - Michigan*. The FCC first indicated its view that

> Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."

Id. ¶ 386. The FCC will also undertake "an assessment of whether all procompetitive entry strategies are available to new entrants" and "whether conditions are such that the local market will remain open" ¶¶ 387, 390. Finally the FCC said it will be:

> "interested in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.

Id ¶ 397.

The FCC's preliminary indication is appropriate, as far as it goes. I take some encouragement from the fact the FCC indicated this was not an exhaustive or exclusive list, and must note again that the federal commission has yet to really reach the issue since all applicants to date have failed on the checklist. I have already expressed the opinion above that SBC also fails the checklist for numerous reasons, but will still present some more comment on the public interest aspect of SBC's application in the event the matter goes that far.

An authoritative analysis of the public interest criterion was recently published in the Federal Communications Law Journal. *See*, Sloan, *Creating Better Incentives Through Regulation: Section 271 of the Communications Act of 1934 and the Promotion of Local Exchange Competition*, ("Incentives") 50 Fed.Communic.L.J 309, 367-386. This excellent analysis of the overall statutory scheme, including the public interest criterion, is available on the World Wide Web at http://www.law.indiana.edu/fclj/pubs/v50/no2/sloan.html. In many respects Sloan's analysis is similar, but he adds considerable meat to the bone. In particular the author emphasizes the absolute need for the BOC to be demonstrably committed to competition. The article asks certain questions that are particularly relevant to SBC:

> In the 1996 Act, Congress both established the goal of promoting competition in all telecommunications markets and provided the blueprint for a regulatory structure that will move the country toward that end. Conscientious and forward-thinking action by federal and state regulators will help accelerate the rate at which competition grows. The goal cannot be reached, however, unless members of the industry work cooperatively and in good faith to make the regulatory structure fashioned by Congress function as intended in the marketplace.330 As the dominant firms in what is now the least competitive telecommunications market, the BOCs and other LECs are crucial to the success of this final implementing stage of the 1996 Act.
>
> Recognizing that fact, the Commission, in determining whether granting a BOC's interLATA application would serve the public interest, wisely intends to assess that BOC's commitment to promoting competition, particularly

> within its local exchange market. Relevant questions in this regard might include: How has the BOC conducted itself in negotiations with prospective competitor and in arbitrations before state commissions? Has it, like GTE, attempted at every turn to minimize its market-opening obligations under the Act or has it been receptive to additional access and interconnection requests? Has the BOC worked with prospective competitors to resolve technical and operational problems expeditiously and in a mutually-acceptable manner? Although this line of inquiry is necessarily qualitative and impressionistic, it is essential nonetheless. In the end, a strong BOC commitment to the goals of the 1996 Act is the best evidence that its entry into the interLATA market will not come at the expense of competition in the local exchange market.

Incentives p. 382 (footnotes omitted)[23]

SBC simply does not have the corporate attitude that is necessary before it can earn interLATA authority. The BOC has delayed, obstructed, opposed, appealed and even defied PUC orders. The strategy is to grind down the opposition and, where necessary, the state regulators who stand in the way of continued local exchange dominance and total elimination of line of business restrictions. In every SBC state the BOC has implemented a "scorched earth" strategy, and it has succeeded in frustrating any real competitive entry to date. SBC is one of the most difficult BOCs with whom to try to negotiate terms. They will not compromise, they will not budge from their standard line.

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23 Footnote 332 to this part of the article, drives home the point to SBC:

See Erik R. Olbeter, Competition Partnership, J. Com., Sept. 11, 1997, at 8A (noting that GTE has filed court challenges against state arbitration decisions in 23 jurisdictions); Mills, supra note 273. Similarly, SBC's stated strategy for local competition is "'to make our welcome mat smaller than anyone else's.'" Peter Burrows, Pick of the Litter: Why SBC Is the Baby Bell To Beat, Bus. Wk., Mar. 6, 1995, at 70 (quoting J. David Gallemore, SBC Vice-President for Marketing). Although SBC should not be condemned for a statement that would elicit nods in most corporate headquarters, it has also taken steps to put its words into action. Thus, SBC lobbied heavily for the Texas statute that makes it more difficult for some firms to enter the local marketplace in Texas. See Mike Mills, The Bells' Fastest Operator, Wash. Post, Jan. 16, 1998, at D4; Edmund L. Andrews, SBC Communications Chief Tests Deregulation's Limits, Austin Am.-Statesman, Apr. 7, 1996, at D1. Similarly, SBC pushed for passage of the Arkansas law that limits the ability of the Arkansas Public Service Commission to adopt access and interconnection requirements beyond those prescribed by the 1996 Act and the Commission's implementing regulations. See Andrew Moreau, Law Hogties Competition, Phone Firms Say, Ark. Democrat-Gazette, Mar. 28, 1997, at 1A; see also supra notes 291-94 and accompanying text.

SBC management at the highest levels must be made to understand they will not succeed by applying brute force. SBC must make a genuine commitment to competition that is spread throughout the enterprise and is implemented with an express mandate from upper management. The change in direction must be irreversible. Giving SBC interLATA authority at this juncture would only reward them for the BOC's misdeeds and complete disregard for the intent and meaning of FTA96. ACSI respectfully requests and recommends that the PUC advise the FCC that SBC should not be granted interLATA authority in Texas at this time.

FURTHER AFFIANT SAYETH NOT.

Charles H.N. Kallenbach

SWORN TO AND SUBSCRIBED before me on the 1st day of April, 1998.

Notary Public In and For the
State of Texas

CARRIE LYNN KEESE
NOTARY PUBLIC
State of Texas
Comm. Exp. 09-12-2001

APPENDIX C

CONDITIONS

As a condition of the grant authorized herein, Bell Atlantic and NYNEX shall comply with the following conditions:

1. Bell Atlantic/NYNEX shall prepare and provide Performance Monitoring Reports as follows:

a. Bell Atlantic/NYNEX shall, at a minimum, develop and maintain the data necessary to complete Performance Monitoring Reports that include the performance measures set out in Appendix D.

b. Bell Atlantic/NYNEX shall, at a minimum, provide upon request to each carrier purchasing interconnection (which for purposes of this letter includes interconnection, transport and termination, services for resale, and/or access to unbundled network elements under section 251 of the Communications Act of 1934, as amended) Performance Monitoring Reports regarding Bell Atlantic/NYNEX's provision of: i) services to Bell Atlantic/NYNEX's retail customers in the aggregate; ii) services and facilities provided to any Bell Atlantic/ NYNEX local exchange affiliate purchasing interconnection (if Bell Atlantic/NYNEX decides to operate a wholesale carrier); iii) services and facilities provided to carriers purchasing interconnection in the aggregate; and iv) services and facilities provided to individual carriers purchasing interconnection. Bell Atlantic/NYNEX shall provide the Performance Monitoring Reports for an individual carrier to that carrier only.

c. Bell Atlantic/NYNEX shall ensure that any individually identifiable carrier information contained in the Performance Monitoring Reports is disclosed only to the individual carrier. Bell Atlantic/NYNEX shall not use any individually identifiable carrier information for any purpose other than providing and reporting on its provision of services and unbundled network elements to the individual carrier.

d. Bell Atlantic/NYNEX shall provide Performance Monitoring Reports to carriers purchasing interconnection from Bell Atlantic/NYNEX beginning 90 days after Commission approval of the merger and no less than quarterly thereafter, except that data for certain measures may not be available by the time of the first report, in which case the measure shall be included beginning with the second report. Bell Atlantic/NYNEX shall make the Performance Monitoring Reports available to the Commission and to state commissions, and shall permit carriers receiving such reports to make the reports available to the Commission and to state commissions, subject to requests for confidential treatment on behalf of Bell Atlantic/NYNEX.

e. Bell Atlantic/NYNEX shall maintain in its files each quarterly Performance Monitoring Report for a period of three years from publication.

f. As provided in Attachment A, Bell Atlantic/NYNEX shall provide access to the available data and information necessary for a carrier receiving Performance Monitoring Reports to verify the accuracy of such reports.

g. To the extent that Bell Atlantic/NYNEX is required by a state commission to produce performance reports containing information in addition to that set out in Attachment A, Bell Atlantic/NYNEX also shall provide such reports to the Commission upon request.

h. Bell Atlantic/NYNEX shall develop a detailed narrative description of the processes it employs in responding to calls from: i) its retail customers, and/or its local exchange affiliate's customers (if Bell Atlantic/NYNEX decides to operate a wholesale carrier); and ii) customers of carriers purchasing interconnection (e.g., what happens if a Bell Atlantic/NYNEX customer calls to report trouble with a line versus what happens if a competing carrier's customer calls with the same complaint). These narrative descriptions shall be made available to carriers purchasing interconnection, the Commission and state commissions upon request.

i. The measurements in the Performance Monitoring Reports described herein will cover no larger an area than a single state.

2. Bell Atlantic/NYNEX shall provide uniform interfaces for use by carriers purchasing interconnection to obtain access to operations support systems as follows:

a. Bell Atlantic/NYNEX shall undertake all commercially reasonable efforts to implement each industry adopted standard or guideline established by the Alliance for Telecommunications Industry Solutions (ATIS) for interfaces used by carriers purchasing interconnection to obtain access to operations support systems (OSS) as soon as reasonably possible, and in any event no later than 180 days after final adoption by ATIS. For those standards or guidelines that have been adopted prior to Commission approval of the merger, BA/NYNEX shall fully implement such standards or guidelines as soon as reasonably possible, and in any event no later than 180 days after final approval of the standards or within 150 days from the date of Commission approval of the merger, whichever is later.

b. For those functions for which ATIS has not adopted industry standards, Bell Atlantic/NYNEX initially shall undertake all commercially reasonable efforts to offer to all carriers purchasing interconnection uniform interfaces (including both a GUI-based or other comparable interface and an EDI-based or comparable application to application interface) within the NYNEX region as soon as reasonably possible and in any event within 120 days following Commission approval of the merger. Similarly, Bell Atlantic/NYNEX shall initially offer to all carriers purchasing interconnection uniform interfaces (including offering an EDI-based or comparable application-to-application ordering interface and making available, upon request, PC-based software comparable to a GUI-type interface) within the Bell Atlantic region as soon as reasonably possible and in any event within 120 days following Commission approval of the merger.

c. Subsequently, Bell Atlantic/NYNEX shall undertake all commercially reasonable efforts to offer to all carriers purchasing interconnection throughout the joint Bell Atlantic/NYNEX region uniform interfaces (including both a GUI-based or other comparable interface and an EDI-based or comparable application to application interface) as soon as reasonably possible and in any event no later than 15 months following Commission approval of the merger.

d. Throughout this period, Bell Atlantic/NYNEX shall continue to make available to carriers purchasing interconnection any existing interfaces that Bell Atlantic and NYNEX have agreed to provide in any interconnection agreements previously entered into with such carriers (unless such carriers agree otherwise).

3. Bell Atlantic/NYNEX shall conduct operational testing of the interfaces used by carriers purchasing interconnection to obtain access to operations support systems as follows:

a. Bell Atlantic/NYNEX shall conduct carrier-to-carrier testing of its interfaces for obtaining access to operations support systems with carriers that request to engage in such testing. Bell Atlantic/NYNEX shall agree to conduct such carrier-to-carrier testing prior to entering into an interconnection agreement with a requesting carrier, and shall be ready to begin such testing as soon as reasonably possible after receiving a request and in any event upon no more than 45 days after a request for such testing has been received. This carrier-to-carrier testing shall be conducted using noncommercial orders to ensure compatibility between the two carriers' systems. The two carriers shall determine the appropriate time period for the duration of such a test. Bell Atlantic/NYNEX shall not limit the opportunity for carrier-to-carrier testing to any individual carrier.

b. Bell Atlantic/NYNEX shall provide evidence to the Commission, by no later than 6 months following Commission approval of the merger, to demonstrate that its interfaces for obtaining access to operations support systems are capable of handling the reasonably expected demands for pre-ordering, ordering, provisioning, billing, repair and maintenance with respect to resold services, unbundled network elements, and combinations of unbundled elements. This evidence shall include, among other things, the operation of such interfaces at actual commercial volumes, the results of testing conducted in conjunction with independent third parties, the results of carrier-to-carrier testing, and the results of internal testing.

4. Bell Atlantic/NYNEX shall propose in interconnection negotiations and arbitrations, and shall propose to state regulatory commissions within 90 days following Commission approval of the merger, the following options to carriers purchasing interconnection and that otherwise would incur one-time, non-recurring charges. These options shall be proposed in addition to the option of paying one-time, non-recurring charges.

a. With respect to non-recurring charges for resold services and for unbundled network elements, Bell Atlantic/NYNEX shall propose an option to permit carriers purchasing interconnection that otherwise would incur one-time, non-recurring charges to pay instead recurring charges for those services that are set at levels to recover the non-recurring amounts. Bell Atlantic/NYNEX shall charge an amount for this recurring charge option that reflects the cost of money, anticipated bad debts, churn rates and costs of administration of the option. The price charged for the recurring charge option shall be designed to be revenue neutral to Bell Atlantic/NYNEX compared to the payment of a one-time charge, and shall be subject to periodic prospective adjustments to reflect actual bad debt experience and churn rates. Such adjustments shall occur, at a minimum, one year after any such option takes effect, and periodically thereafter as warranted. The offer shall apply to non-recurring charges incurred for resold services and for unbundled network elements purchased by telecommunications carriers for the provision of basic residence and business dial tone line exchange or exchange access services (including vertical features) to retail customers.

b. With respect to non-recurring charges for collocation and for the establishment of office dialing plans, Bell Atlantic/NYNEX shall propose an option to permit carriers purchasing interconnection that otherwise would incur one-time, non-recurring charges to pay instead such charges on an installment basis over a period of up to 18 months. A carrier shall be eligible for this installment option only if it and its affiliates (as affiliates are defined in the Communications Act of 1934, as amended), if any, have gross revenue of less than $2 billion per year arising from the provision of telecommunications services or facilities. Bell Atlantic/NYNEX shall charge an amount for this installment option that reflects the cost of money, anticipated bad debts, and costs of administering the option. The price charged for the installment option shall be designed to be revenue neutral to Bell Atlantic/NYNEX compared to the payment of a one-time charge, and shall be subject to periodic prospective adjustments to reflect actual bad debt experience. Such adjustments shall occur, at a minimum, one year after any such option takes effect, and periodically thereafter as warranted.

c. Bell Atlantic/NYNEX shall propose, in interconnection negotiations and arbitrations, mechanisms for the payment of non-recurring charges for collocation that are consistent with the Commission standards established in *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Dkt 93-162, Second Report and Order, FCC 97-208 ¶¶ 32-33, 45-51, 54-56 (June 13, 1997).

5. Bell Atlantic/NYNEX shall provide, to carriers purchasing interconnection, shared transport as an unbundled network element at usage sensitive (minutes of use) rates that are based upon forward-looking, economic costs for use in providing telephone exchange and exchange access service. Bell Atlantic/NYNEX shall provide such shared transport in conjunction with unbundled local switching, for traffic that is originated by and terminated to a purchasing carrier's end user subscriber to be routed in the same manner as Bell

Atlantic/NYNEX's own traffic without the payment of interstate interexchange access charges.

6. To the extent Bell Atlantic/NYNEX proposes rates, including in interconnection negotiations and arbitrations, for interconnection, transport and termination, or unbundled network elements, including both recurring and non-recurring charges, any such proposal shall be based upon the forward-looking, economic cost to provide those items.

7. Bell Atlantic/NYNEX shall engage in good faith negotiations with carriers purchasing interconnection in response to reasonable requests to establish performance standards subject to reasonable requirements governing mutuality of performance in the following areas:

a) Pre-ordering, including the response time of the pre-ordering interface and the availability of the pre-ordering interface;

b) Ordering, including the timeliness of order confirmation and order rejection notifications;

c) Provisioning, including the average provisioning interval offered, the average interval in which provisioning is completed, missed installation appointments, and installation trouble reports received within 30 days;

d) Billing, including the timeliness of the wholesale bill and the timeliness of the daily usage feed;

e) Maintenance and repair functions, including the mean time to repair, missed repair appointments, and the percentage of repeat trouble reports; and

f) Network performance, including network blockage.

In addition, Bell Atlantic/NYNEX shall engage, upon reasonable request, in good faith negotiations to establish appropriate enforcement mechanisms to ensure compliance with each standard, including good faith negotiations upon reasonable request for private or self-executing remedies.

8. These commitments shall sunset 48 months after Commission approval of the merger.

9. Bell Atlantic/NYNEX shall negotiate supplements or amendments to existing interconnection agreements where necessary in response to a request that is covered by the conditions contained herein from a carrier purchasing interconnection. This condition shall apply regardless of whether such existing agreements expressly provide for amendment or modification. Bell Atlantic/NYNEX shall treat the commitments as amendments to

Commission rules in interpreting any clauses that permit amendments to interconnection agreements to take into account changes in Commission rules.